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ALEXANDER L. STEVAS,
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NO. 82 - 1507
IN THE

Supreme Court of the United States

October Term, 1982

WASHINGTON STATE DEPARTMENT OF GAME, et al.,

Petitioners,

v.

UNITED STATES OF AMERICA

and

QUINAULT INDIAN NATION, et al.,

Respondents.

On Writ Of Certiorari To The
United States Court of Appeals
For The Ninth Circuit

QUINAULT INDIAN NATION'S BRIEF IN OPPOSITION

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Respondent, Quinault Indian Nation, respectfully requests that the Petition for Writ of Certiorari filed by Petitioners, State of Washington and Washington Department of Game be denied.

QUESTIONS PRESENTED 1/

1. Under this Court's decisions in Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. 658 (1979) and Puyallup Tribe v. Washington Department of Game, 433 U.S. 165 (1977), is the State of Washington entitled to a 50% share of the anadromous fish runs which have entered the Quinault Indian Reservation never to leave again, and which

1/ Petitioner State's formulation of the questions presented differs significantly from those it presented to the Court of Appeals which are reprinted in Appendix A hereto. See Brief of Appellant State of Washington in the Court of Appeals at 1. Petitioners should not be permitted to raise their Question No. 1 which was not decided by the court of appeals or district court for the first time before this Court. See infra at 14-16.

therefore can only be harvested by opening the Quinault Indian Reservation on which the Quinault Nation has always excercised exclusive fishing rights to fishing by non-Indians, thereby overriding the Tribe's exclusive fishing right?

2. Should the district court have enjoined the Quinault Tribe's on-reservation fishery in the absence of a showing that such a curtailment would either (a) be necessary for the preservation of the resource, or (b) significantly increase the opportunity for the nontreaty fishermen to harvest a greater portion of their allocation consistent with permitting a full harvest of the harvestable portions of the run?

LIST OF PARTIES TO PROCEEDING

Respondent, Quinault Nation, concurs in the State's listing of the parties.

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OPINION BELOW

Petitioners statement and presentation of the opinions below in the Appendices to the Petition are correct with the following caveat. The district court's May 8, 1981 Order modified the recommended findings of fact contained in the Magistrate's Report and Recommendation "by deleting the last sentence of the next to last paragraph [of the section designated 'Factual Setting'] (lines 8-10 of p. 5 of the Report)." See Order of May 8, 1981, Petition Appendix C at 3.

Because Petitioners reprint the Magistrate's Report and Recommendation in Appendix B without line numbering and with different pagination from the original it is difficult to identify the modification as presented in the Petitioner State's Appendix. The deleted sentence which was unsupported by the record appears at page 10 of Appendix B to the Petition and reads:

"Others own fee patent land on the river within the reservation, and fish there for steelhead."

JURISDICTION

Respondent, Quinault Nation, does not disagree with Petitioner's statement.

TREATIES INVOLVED

Respondent, Quinault Nation, does not disagree with Petitioner's statement.

STATEMENT OF THE CASE

Washington initiated the proceeding giving rise to the instant Petition by invoking the continuing jurisdiction of the District Court for the Western District of Washington in United States v. Washington, 384 F.Supp. 312, 419 (W. D. Wash 1974), aff'd, 520 F.2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976). Washington sought to enjoin on-reservation fishing by members of the Quinault Nation on 1980-81 winter run Quinault River steelhead and to enjoin the Nation from promulgating further

regulations authorizing the fishery. The magistrate's recommendation (Petition Appendix B) that the State's motion be denied was approved by the district court with modifications. (Petition Appendix C) Washington appealed the denial of the preliminary injunction and the court of appeals affirmed in an opinion reported at 693 F.2d 188. (Petition Appendix A).

Knowledge of the facts is necessary to understand this case. Indeed, the result in this case turns on its unique facts; the application of well-established legal principles to those facts being quite straightforward.

Prior to treaty times and ever since the Quinaults have relied on the salmon and steelhead runs in the Quinault River for their livelihood. United States v. Washington, supra, 384 F.Supp. at 374-75. The Quinault Reservation was established, pursuant to Article 2 of the Treaty of

Olympia, 12 Stat. 971, by Executive Order of November 4, 1873, I Kappler, Indian Affairs Laws and Treaties, 923 (1904). Its size and location in the Quinaults' ancestral territory are a product of, among other things, the desire of federal authorities to provide a permanent homeland with exclusive fisheries for the Indians who were heavily dependent on fishing for their livelihood. Halbert v. United States, 283 U.S. 753, 757 (1931); The Quinaielt Indians, 102 Ct.Cl. 822, 825 (1945).

The Reservation thus includes the entire 34 miles of the Lower Quinault River, all of Lake Quinault, and a number of other rivers and streams. The Quinaielt Indians, supra; Executive Order of November 4, 1873, I Kappler, Indian Affairs Laws and Treaties, supra. The Quinault River, however, originates upstream of Lake Quinault in lands outside of the Reservation. This portion of the Quinault River outside of the

Reservation will be referred to as the Upper Quinault River. A sketch map of the Quinault Reservation is attached hereto as Appendix B.

Steelhead are anadromous fish and like salmon hatch in fresh water, migrate to the ocean where they rear and reach mature size, and eventually complete their life cycle by returning to the freshwater place of their origin.^{2/} The steelhead run on the Quinault River is an annual run that returns to the river in the winter. About 85% of the run spawns or returns to tribal or federal hatcheries on the Reservation in the Lower

^{2/} While steelhead do not necessarily die upon spawning, "[t]he frequency of survival beyond the first spawning is low.... Because of the extremely low survival, repeat spawners are considered of only minor significance in management of the species." Exhibit JX-2a. Joint Statement Regarding the Biology, and Harvest of the Salmon and Steelhead Resources of the Puget Sound and Olympic Penninsular Drainage Areas of Western Washington, prepared by Washington Departments of Game and Fisheries and the United States Fish and Wildlife Service.

Quinault River and its tributaries. The remaining 15% of the run spawns in the Upper Quinault River upstream of the Reservation. Due to the nature of these fish 85% of the run, once it has returned to the Reservation, will not leave the Reservation and re-enter off-reservation fishing areas, either below or above the Quinault Reservation. See Petition Appendix B at 7-8. These fish were designated "reservation fish" by the district court because they are either harvested or spawn and die on the Reservation. The remaining 15% of the run which is produced off the Reservation are designated "through fish" because they pass through the Reservation on their way to off-Reservation spawning grounds where they are available for harvest by non-treaty fishermen. Id.

Both reservation and through fish are subject to harvest at several locations. In the ocean they are available for harvest by

both treaty and non-treaty fishermen. On the Quinault Reservation when the fish enter the Quinault River they are harvested in a tribal commercial net fishery in the lower 6 miles of the river. The only other on-reservation fishery is a tribally managed sport fishery in which non-Indians may participate by hiring tribally licensed Indian guides. Participation in this on-reservation sport fishery is now, and always has been, exclusively regulated by the Tribe to meet conservation requirements and the Tribe's management objectives.

On the Upper Quinault River, off the Reservation, there is a non-Indian sport fishery which harvests "through fish." This non-treaty fishery is regulated exclusively by the State. Quinault tribal members do not fish the Upper Quinault which is closed to treaty fishing by tribal regulation.

Washington sought an injunction to close the tribal fishery on the Lower River,

within the Reservation, at 50% of the harvestable steelhead, claiming that the 50-50 sharing rule applies to both "reservation" and "through" fish in the Quinault River steelhead run wherever they are found throughout their life cycle.

The district court denied the motion, holding that the 50-50 principle applies to the Upper River "through" fish, but not to Lower River "reservation" fish that will not leave the Quinault Reservation where the Tribe's fishing rights are exclusive.

The district court concluded that closure of the treaty fishery was unwarranted because "reservation" fish whether or not caught by treaty fishermen will never leave the Quinault Reservation. These fish are simply not available for harvest by non-treaty fishermen, who have no access to them once they return to the reservation where they were produced.

As for "through" fish, no closure was

warranted because the district court found no evidence that the tribal fishery in any way impinged on the non-treaty fishermen's opportunity to harvest their share of the small number of fish passing through the Quinault Reservation to the sport fishery on the Upper River. See Petition Appendix B at 26. This finding of fact was not challenged on appeal.

Washington's assertion that the ownership of the uplands bordering Lake Quinault and the Quinault River is "important to this case" is incorrect and an attempt to recast the issues on appeal. The State's claim in this case has never focused on the rights of individual upland landowners. Rather, it is a very broad claim that the non-Indian public is entitled to harvest 50% of the Quinault River Steelhead, including both "reservation" and "through" fish.

Throughout this case, the State has

urged that it is entitled to 50% of the Quinault River steelhead to provide fish for all the State's "sport fishermen" including nonresidents coming from "metropolitan areas." Indeed, Washington has sought to curtail tribal fishing because the State believes such curtailment will attract the non-Indian public to the Quinault River.

Notwithstanding the fact that there are non-Indian landowners within the Reservation, none is before the Court and the State advanced no claims specifically on their behalf below. Indeed, no record was developed to support or consider such claims in the district court. While the magistrate accepted a State assertion that non-Indians fish from fee land within the reservation, (Petition Appendix B at 10) the district court deleted that finding in its order adopting and approving the magistrate's report for lack of any evidentiary support in the record. The district court therefore

did not consider the claim that the State attempts to raise here because such a claim was never presented for decision by the record before it.^{3/}

3/ The landownership "facts" the State presents in the Petition at 18 with respect to landownership around Lake Quinault were not before the district court. Facts pertaining to land ownership of both the on and off-reservation uplands around Lake Quinault were provided to the court of appeals pursuant to a post-argument order. See Order of July 14, 1982, Appendix C hereto. The court of appeals opinion, however, does not appear to have relied on those facts, nor does it appear from the opinion below that the court ultimately found them relevant to the issues in the case. Furthermore, the ownership pattern of the uplands around the lake can be misleading. The uplands surrounding the lake are partly within and partly without the Quinault Indian Reservation. As the accompanying map, Appendix A, and the survey maps reproduced as Appendices to the opinion in The Quinault Indians, 102 Ct. Cl. 822 (1945) show the Reservation boundary was drawn by the United States at the lakeshore for most of the distance around the lake so that the uplands at the southwestern end of the Reservation and the entire lake are within the Reservation while the remaining uplands are outside of the Reservation. Most of these off-reservation riparian uplands (87%) are part of the Olympic National Park or Forest. As for the on- (footnote continued on next page)

FEDERAL COURT JURISDICTION

The Quinault Nation does not disagree with the Petitioners' statement.

REASONS FOR DENYING THE WRIT

The questions properly raised by this case are plainly insubstantial. As the Court noted when this case was before it in 1979, "notwithstanding the bitterness that this litigation has engendered, the principal issue involved is virtually a 'matter decided.'" Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979). If anything, that characterization applies with more force to this dispute.

The Quinault on-reservation fishery which Washington seeks to limit does not affect non-treaty fishermen's opportunity to

(footnote continued from previous page)
reservation upland around the lake, while the State indicates less than half is held in trust, the majority is owned by the Quinault Nation or its members in either trust or fee status.

harvest Quinault River steelhead in the ocean. It does not impinge on the non-treaty fishermen's opportunity to harvest their share of those Quinault River steelhead which are produced upstream of the Quinault Reservation, and pass through the Reservation on their way to the non-Indian sport fishery on the Upper Quinault River. See Petition Appendix B at 26. Instead, Washington sought to enjoin the Quinault on-reservation fishery to prevent the harvest of fish produced on the Quinault Reservation which return to the Reservation and would never leave it absent any fishery.

Both Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n., 443 U.S. 658 (1979) and Puyallup Tribe v. Washington Department of Game, 433 U.S. 165 (1977) hold that an on-reservation treaty fishery is subject to restrictions to the extent necessary to protect other citizens right to fish off the reservation. The

district court and court of appeals, see Judge Canby's concurring opinion, both applied that principle and held that the non-treaty fishermen are entitled to 50% of harvestable fish passing through the Quinault Reservation to upstream fishing areas off the Reservation. The district court, however, found that Washington had presented no evidence that the Quinault fishery within the Reservation impinged on the non-treaty fishermen's opportunity to harvest their share of those fish.

The vast majority of the Quinault River steelhead run, however, enters the Quinault Reservation and will never leave it. With respect to those fish it is well settled and res judicata as to Washington, that the Quinault Nation possesses an exclusive right to fish on its Reservation. Therefore the courts below properly concluded Washington has no further opportunity to harvest this portion of the run once it has entered the

Reservation.

More than 50 years ago in Pioneer Packing Co. v. Winslow, 159 Wash. 655, 294 P. 557 (1930), the Supreme Court of Washington held:

After considering the provisions of treaty and the cases cited, we are of the opinion that in the present case the Quinault Indians own the fish in the Quinault River by the same title and in the same right as they owned them prior to the time of the making of the treaty, and that the state has no right to interfere with or control their right to take fish from a stream which crosses the reservation.

In Mason v. Sams, 5 Fed. (2d) 255 [1925], the Federal District court for the western district of this state expressed views similar to those which we entertain, as above set forth.

Id., 159 Wash. at 662.

More recently, in this case the district court in its initial decision held:

An exclusive right of fishing was reserved by the tribes within the area and boundary waters of their reservations

United States v. Washington, 384 F. Supp. at 332 and n.12 (Emphasis in original, footnote omitted.)

Only four years ago in reviewing a series of orders in this case this Court confirmed the district court's holding:

[I]t is clear that the Tribe may exclude non-Indians from access to fishing within the reservation

Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 683-84 (1979); See also, Id., at 684 and 687. Indeed, while the Court was divided on the issue of off-reservation fishing rights, with respect to on-reservation fishing rights the decision was unanimous:

In addition, the Indians retained the exclusive right to take fish on their reservations, a right not involved in this litigation.

Id. at 698. (Justices Powell, Stewart, and Rehnquist dissenting.) It is simply too late in the day for Washington to challenge the Quinault Nation's exclusive right to fish on its Reservation, where the Quinault Indians have always exercised exclusive

fishing, rights and to seek to open the Reservation to non-Indian fishing subject to State regulation.

Finally, the State makes much of Montana v. United State, 450 U.S. 544 (1981). But, given the long recognition of exclusive Quinault on-reservation fishing rights, any question with respect to title to the reservation's submerged land is plainly insubstantial. Unlike the Crow Reservation, the Quinault Reservation was established for Indians wholly dependent on fishing. Thus, this case comes clearly within the Alaska Pacific Fisheries v. United States, 248 U.S. 78 (1918), line of cases recognized in Montana v. United States, supra, at 556.

Indeed, there has been little dispute over ownership of submerged lands within the Quinault Reservation. For over 50 years the State has agreed that ownership of the submerged lands within the Quinault

Reservation was reserved by the United States for the exclusive benefit of the Tribe. In a published opinion issued in 1928 Washington's attorney general analyzed ownership of the submerged lands in the Quinault Reservation under the test enunciated in United States v. Holt State Bank, 270 U.S. 49 (1926) and concluded:

We believe ownership of such beds and shores, and, as incident thereto, jurisdiction over the waters themselves, was intended to be reserved by the United States exclusively for the Indians. ... [I]f our conclusion in respect to the latter question were to the contrary, obviously it must also be held that the state has power to regulate fishing in the disputed waters, a holding which we are satisfied would serve to defeat the primary object of the government in establishing the reservation.

1927-28 Opinions of the Attorney General of the State of Washington, 783, 788 (June 22, 1928).

Washington offers no reason why this Court's conclusion in Montana based on very different facts should compel

reconsideration of settled expectations with respect to ownership of submerged lands in the Quinault Reservation. See Oregon v. Corvallis Sand & Gravel Co., 429 U.S. 363 (1977); Confederated Salish and Kootenai Tribes v. Namen, 665 F.2d 951 (9th Cir. 1982), cert. denied, U.S. ,103 S.Ct. 314 (1982). And, Washington offers no reason why it should be allowed expand United States v. Washington and change it from a fishing case to a title case at the appellate level.

CONCLUSION

For the above reasons the petition for writ of certiorari should be denied.

Dated this 9th day of May, 1983.

Respectfully submitted,

Richard Reich
Richard Reich
Office of Reservation
Attorney
Quinault Indian Nation

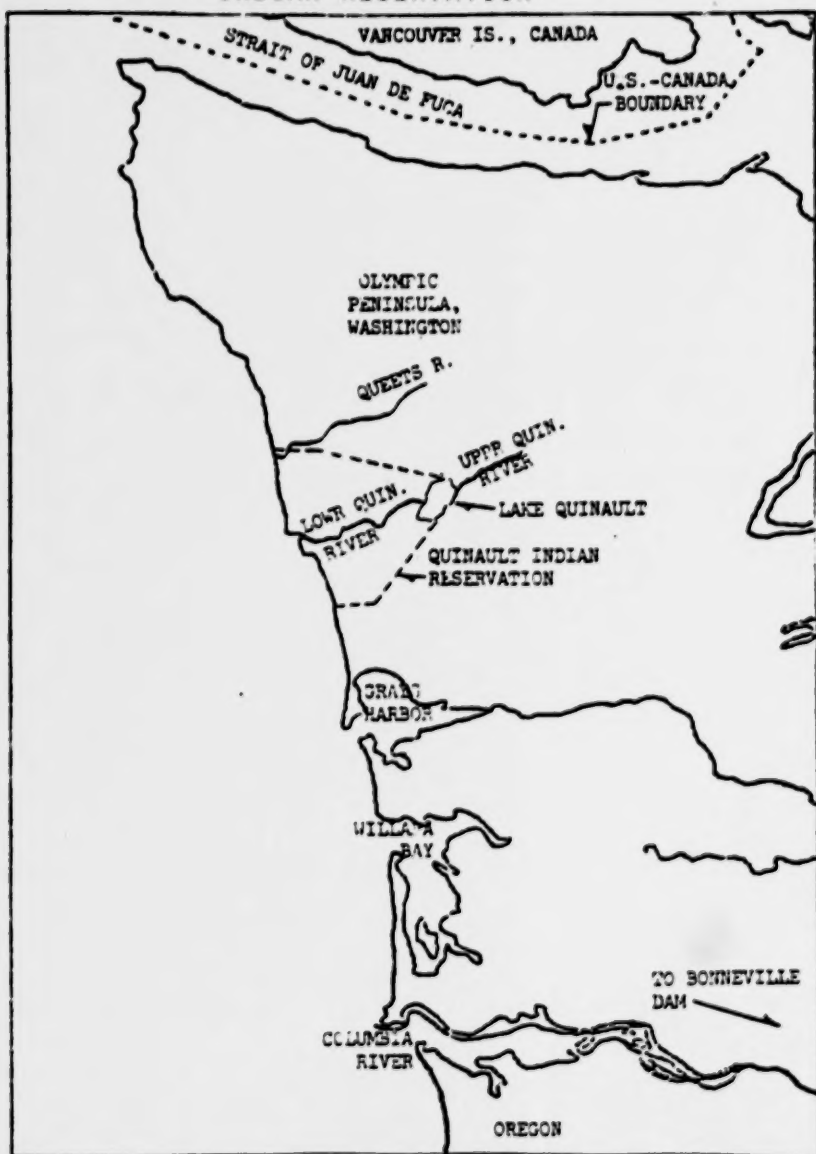
Excerpt from Brief of Appellant Washington
in this case in the Court of Appeals

"STATEMENT OF ISSUE PRESENTED FOR REVIEW

Whether the decisions of the United States Supreme Court including Puyallup Tribe v. Washington Department of Game, 433 U.S. 165 (1977) and Washington v. Washington State Commercial Passenger Fishing Vessel Assn., 443 U.S. 658 (1979), limit the Quinault Indian fisheries to a 50% maximum catch of the harvestable steelhead trout run in the Quinault River? Should (must) the federal court with continuing jurisdiction over this fishery implement this limitation in the face of tribal refusal to stop its fishery?"

Brief of Appellant State of Washington in the Court of Appeals at 1. United States v. Washington, C.A. No. 81-3502

MAP OF OLYMPIC PENINSULA AND QUINAULT
INDIAN RESERVATION



UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF)	
AMERICA, et al.,)	
)	No. 81-3502
Plaintiffs-Appellees,)	
)	ORDER
v.)	
)	Filed July 14,
STATE OF WASHINGTON,)	1982
et al.,)	
)	
Defendants-Appellants.)	

Before: WRIGHT, KILKENNY and CANBY, Circuit
Judges

Counsel for the parties in this case are hereby ordered to submit, in writing within ten (10) days of the filing of this order, their contentions as to the number, nature, and extent of individual parcels of land bordering Lake Quinault on the Quinault Indian Reservation held in fee by non-indians.

BY ORDER OF THE COURT:

Phillip B. Winberry
Clerk of Court

By: Cathy A. Catterson
Deputy Clerk